IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

FRIDAY, THE 13TH OCTOBER 2006 / 21ST ASWINA 1928

Ins.APP.No. 3 of 2003()

IC.140/2001 of EMPLOYEES INSURANCE COURT, ALAPPUZHA

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APPELLANT/APPLICANT IN I.C.

M/S.OBEROI, RESTAURENT, M.G.ROAD,
COCHIN-35, REPRESENTED BY ITS MANAGING PARTNER,
DHANPATHRAI OBEROI.

BY ADV. SRI.A.V.XAVIER
SRI.JOLLY JOHN

RESPONDENTS: OPP.PARTY IN IC.

THE EMPLOYEES STATE INSURANCE
CORPORATION, PANCHADEEP BHAVAN, N.S.ROUND,
TRICHUR-680 020, REPRESENTED BY ITS REGIONAL
DIRECTOR.

BY ADV. SRI.P.SANKARANKUTTY NAIR, SC, ESI CORPN

THIS INSURANCE APPEALS HAVING COME UP FOR ADMISSION
ON 13/10/2006, ALONG WITH MFA NO. 523 OF 2003
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Thottathil B. Radhakrishnan, J.

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Ins.App.3 of 2003 &
M.F.A.No.523 OF 2003

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Dated this the 13th day of October, 2006.

JUDGMENT

These appeals arise from I.C.No.140 of 2001 of the Employees Insurance Court, Alappuzha, hereinafter referred to as the "E.I.Court", for short. M.F.A.No.523 of 2003 is by the Employees' State Insurance Corporation, hereinafter referred to as the "Corporation", for short, and Insurance Appeal No.3 of 2003 is by the establishment, a hotel.

2. On the basis of the notification issued by the Government of Kerala on 27-5-1976, a hotel was required to be covered under the Employees' State Insurance Act, hereinafter referred to as the "Act", for short, only if there are 20 or more employees on the rolls. The establishment was not covered since it had only less than 20 employees on its rolls. Following the amendment to Section 2(12) of the Act in the year 1989, the Corporation insisted on the coverage of the establishment on the ground that the establishment had

ten or more employees and that it uses power in the manufacturing process. The stand taken by the Corporation was challenged by the establishment by filing I.C.No.73 of 1991 before the E.I.Court. That case was decided in favour of the establishment in the year 1993. The Corporation carried an appeal to this Court as M.F.A.No.171 of 1994. In the meanwhile, the Apex Court decided the case in **G.L.Hotels Limited v. T.C.Sarin (1993 (4) S.C.C.363)** holding that the hotels are factories. The appeal of the Corporation was disposed of along with a batch of connected matters as per judgment dated 2-11-1989 by a Division Bench of this Court holding that the hotels are factories and that the E.I. Court will decide the question of coverage afresh. Thereafter, on the inspection conducted by an Insurance Inspector in the establishment on 30-10-2000, contribution was assessed for the period 4/90 to 9/00. An additional contribution on omitted wages was also assessed. Interest was levied from 4/90, though assessment of contribution was only on 30-10-2000. The interest was found chargeable for the entire period of coverage,

that is, from 4/90. An order for damages was also imposed.

3. The establishment challenged the imposition of damages and levy of interest from 4/90. By the impugned decision of the E.I.Court delivered on 28-11-2002, it was held that the levy of interest ought to have been following the same yardstick that could have been applied as regards imposition of damages and further that levy of interest was accordingly liable to be set aside. It was directed that the rate of interest ought to be revised from 23-11-1999.

4. In so far as the imposition of damages is concerned, the court held that the same has to be slashed and would apply only from 23-11-1999, since the delay caused until then, cannot be taken as providing sufficient ground to impose damages. On such basis, the levy of interest was also ordered to be confined from 23-11-1999 only.

5. The appeal of the establishment is regarding

the levy of damages from 23-11-1999 as per the order of the E.I. Court as also the little interest that would accrue from 23-11-1999 to 30-10-2000, the date on which the Insurance Inspector had visited the premises of the establishment and made the assessment.

6. The appeal of the Corporation is confined to the interference by the E.I.Court as regards the chargability of interest.

7. In so far as the appeal of the establishment is concerned, the E.I.Court found that there was no material to hold that the delay until 22-11-1999 was contumacious and therefore it was inappropriate to impose any order for damages. The finding that from 23-11-1999 damages could be levied is essentially a finding of fact and the said finding, going by the materials on record and the quality of appreciation that has gone into the decision making process, cannot be treated to give rise to a substantial question of law to interfere with the order of the E.I.Court at the instance of the establishment. Having regard to the

facts of the case, I am not inclined to disturb the finding of the E.I.Court. There were sufficient jurisdictional facts established to sustain the decision of the Corporation to impose damages at least from 23-11-1999. The appeal of the establishment accordingly fails.

8. In so far as the appeal of the Corporation is concerned, the short issue that would arise for decision is as to whether there was any ground on which the chargability of interest under Section 39(5)(a) read with Regulation 31A of the Employees' State Insurance (General Regulations) 1950 could be deferred until 23-11-1999. The coverage of the establishment from 4/90 is not in dispute. The accrual of interest under sub-section 5(a) of Section 39 of the Act is an incidence of the statute and does not depend upon any order of the Corporation. The liability to pay such interest arises eo-instanti the non-payment of the amounts due on the date on which such principal amount would become due under the statute. If the establishment was liable to be covered from 4/90, there

is no reason to assume that the liability to contribute did not accrue on the said date. If that be so, the flow of Section 39(5)(a) will take with in its sweep, the entire liability to pay interest, as provided under the said provision, which is part of a social welfare legislation. The provisions in sub-section 5(a) of Section 39 do not leave any room either to the Corporation or to the E.I.Court to postpone the incidence of chargability of interest under that provision. This leads to the argument advanced on behalf of the establishment that the liability to pay interest under sub-section 5(a) of Section 39 would accrue only if any contribution payable under the Act is not paid and the liability to pay has to be incurred as a pre condition for the incidence of liability, to be mulcted with the liability to pay interest. Dilating on this aspect, the learned counsel for the establishment cited the decision of the Division Bench of this Court in **Regional Director, ESI Corporation v. Cannanore Spinning & Weaving Mills (2001 (3) K.L.T. 393).** There can be no quarrel for the proposition that the incidence of the liability of interest would

germinate only on the occurrence of liability to contribute in terms of the provisions of the Act, thereby meaning that unless a person becomes liable to pay contribution and unless he commits default, the liability to pay interest does not arise. The Bench deciding the aforesaid case was concerned with an amendment to the Act, which amendment was the subject-matter of a writ petition and during the pendency of the said writ petition there were orders of stay granted against the operation of the amendment. So much so, the Bench came to the conclusion that the operation of the amendment on the basis of which the levy of contribution was sought for came only after the conclusion of the writ proceedings challenging the amendment and there was no incidence of levy of contribution at any earlier point of time and therefore the date of contribution itself stood postponed till the date on which the amendment came into force after the stay orders granted by the writ court stood vacated. It was in that premise that the Bench held that the levy of interest does not arise, as contended by the Corporation in that case. I am of the opinion

that the said Bench decision has no bearing on the questions arising for decision in this case and if at all it does, the same is only in favour of the Corporation, to wit, that the levy of interest accrues at the time when there is default in paying the contributions, which an establishment would be liable under the Act.

8. In this view of the matter, the E.I. Court erred in law in holding that the establishment was liable to pay interest under Section 39(5)(a) of the Act only from 23-11-1999. To that extent, the impugned order is vitiated on a substantial question of law, namely, as to whether such a restriction imposed on the date on which the levy of interest can be made is a permissible restriction under Section 39(5)(a) of the Act.

9. The result of the aforesaid discussion is that the appeal of the Corporation as regards the question of levy of interest succeeds and the establishment is liable to pay interest from 4/90, as contended by the

Corporation.

10. In the result, Ins.Appeal No.3 of 2003 filed by the estalishment is dismissed and M.F.A.No.523 of 2003 filed by the Corporation is allowed vacating the direction of the E.I.Court regarding the recovery of interest.

The parties will bear their respective costs.

Thottathil B.Radhakrishnan,
Judge.

sl.

Thottathil B. Radhakrishnan, J.

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Ins.App.3 of 2003 &
M.F.A.No.523 OF 2003

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JUDGMENT

Dated:13-10-2006